

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5804 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

M/S. JAVER JIVAN MEHTA

Versus

ASSISTANT COMMISSIONER OF SALES TAX (APPEALS)VIII

Appearance:

1. Special Civil Application No. 5804 of 1985
MR KH KAJI for Petitioner
MR P.G. DESAI, instructed by
M/S MG DOSHIT & CO for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE A.R.DAVE

Date of decision: 19/08/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The petitioner, a proprietary concern carrying on business in the manufacture of castor oil, has challenged the assessment orders made on 30.4.1985 by the first

respondent in respect of the assessment periods S.Y 2029, 2030, 2032, 2033 and 2034 and the orders passed by the second respondent staying the assessment proceedings for S.Y 2029, 2030, 2032, 2033 and 2034 and also the demand notices dated 12th September, 1985 issued by the third respondent.

2. The petitioner is a registered dealer both under the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Gujarat Act") and the Central Sales Tax Act, 1956 (hereinafter referred to as "the Central Act"). The petitioner was assessed under Section 41 of the Gujarat Act read with Section 9(2) of the Central Act, for S.Y 2029 and 2030 on 24th October, 1976 and 23rd January, 1977 respectively, by the Sales Tax Officer. For the S.Y 2032, the assessment was made on 31st January, 1978. In respect of these three years, the Sales Tax Officer, Enforcement Branch, Surat, issued a notice under Section 44 of the Gujarat Act for reassessment of sales tax on 7th October, 1978, which was served on the petitioner on 10th October, 1978. According to the petitioner, objections were raised on various grounds against that notice. The third respondent prepared a draft re-assessment order under Section 46A(2) of the Gujarat Act, read with Section 9(2) of the Central Act, in respect of all these three years and forwarded them to the first respondent. The first respondent passed the assessment orders on 31.4.1985 confirming the draft re-assessment order and served the orders on the petitioner on 14th September, 1985 with the notice of demand dated 12th September, 1985.

3. As regards the assessment periods of S.Y 2033 and 2034, according to the petitioner, the last dates by which the assessment orders could have been passed under Section 42 of the Gujarat Act were 7.11.1980 and 27.10.1981 respectively. According to the petitioner, no assessment orders were passed by the State within two years from the end of the year in which the last return was filed for the relevant assessment period. The notices for assessment under Section 41 of the Gujarat Act was issued by the Sales Tax Officer on 7th October, 1978 and were served on the petitioner on 10th October, 1978. The assessment proceedings were carried out thereafter and the third respondent issued draft assessment orders on 11.1.1984, which were served on the petitioner on 16.1.1984 against which objections were raised by the petitioner on 3.2.1984. After hearing the petitioner, the first respondent made the assessment orders on 30th April, 1985 in respect of S.Y 2033 and 2034, which were served on the petitioner on 14th

September, 1985 alongwith a notice of remark dated 12th September, 1985.

4. In the above background, the learned counsel appearing for the petitioner raised the following contentions:-

(i) The reassessment orders for the S.Y 2029, 2030 and 2032 were made beyond the period of three years from the date of service of notice contemplated by the provisions of Section 44 of the Gujarat Sales Tax Act, 1969. Even the assessment orders for the S.Y 2033 and 2034 were made beyond the period prescribed by the provisions of Section 42 of the said Act, which as stated in the petition was two years. The impugned reassessment and assessment orders are therefore, made without jurisdiction and illegal.

(ii) The stay which was granted under the first proviso to Section 42(1) was granted without there being any reasons for the same and the stay orders violated the ratio of the decision of the Hon'ble Supreme Court in Fag Precision Bearings V. Sales Tax Officer (I) and anr., reported in 104 S.T 143, which laid down that the power of the State Government or the Commissioner under Section 42(1) of the Gujarat Act, to stay assessment proceedings can be exercised only in extra-ordinary circumstances and for supervening reasons which cannot be attributed to the default or failure of the assessing authorities.

5. The learned Government Pleader appearing for the respondent authorities submitted that when the proceedings were undertaken under the provisions of Section 46A of the Act, the period of three years was to be reckoned from the date of the service of the draft assessment order. It was submitted that it is only when the proceedings were transferred to the Authority to which an appeal would lie and received by it that the Authority will be in a position to exercise it's power of reassessment under Section 44 of the Act. Therefore, the period of limitation should be computed from the date of service of the draft order. It was further argued that the stay orders were granted in all these cases for valid reasons and were not objected to at the relevant time until the making of the assessment order. It was submitted that the petitioners therefore, should not be allowed to challenge the validity of the orders.

6. Before appreciating the rival contentions raised, we may refer to the Gujarat Sales Tax Act, 1969, which were in force at the relevant time. The time limit for completing assessment is provided in Section 42 of the said Act, which reads as under:-

"42. (1) (a) No order of assessment for a year or part of a year shall be made under sub-section (3) or (4) of Section 41 at any time after the expiry of three years from the end of year in which the last monthly, quarterly or as the case may be, annual return is filed.

(b) Where the Commissioner issues a notice under sub-section (6) of Section 41 to any dealer for assessment of tax in respect of any period, no order of assessment shall be made for such part of the period, if any, as is prior to:--

(i) a period of eight years ending on the last date of the year immediately preceding the year in which such notice is issued, in a case where the Commissioner has reason to believe that such dealer has failed to apply for registration with an intention to defraud Government revenue; and

(ii) a period of four years ending on the last date as aforesaid, in any other case:

Provided that for the purpose of this Section if it is considered necessary so to do, the State Government may, subject to such conditions as it may deem fit, and the Commissioner may, subject to such conditions as may be prescribed, by a general or special order, stay, either generally or for a specified period, the assessment proceedings of a dealer or class of dealers:

Provided further that in computing the period of limitation for the purposes of this Section, any period during which assessment proceedings are stayed under the first proviso or by an order or injunction of any court or authority shall be excluded:

Provided further that where a fresh assessment is required to be made in pursuance of any order under Section 65, 67 or 69 or in

pursuance of any order of any court or authority such fresh assessment shall be made at any time within three years from the date of such order.

- (2) Nothing in sub-section (1) shall apply to any assessment proceedings (including any notice issued) pending immediately before the appointed day."

7. The provisions regarding re-assessment of turnover escaping assessment contained in Section 44 of the Gujarat Sales Tax Act, 1969, which were in force at the relevant time, read as under:-

"44. If the Commissioner has reason to believe that any turnover of sales or turnover of purchases of any goods chargeable to tax under this Act has not been assessed in respect of any period in an order of assessment made under Section 41, then the Commissioner may--

- (a) where he has reason to believe that the dealer has concealed such sales or purchases or any material particulars relating thereto, or has knowingly furnished incorrect declaration or returns, at any time within eight years, and
- (b) in any other case, at any time within five years of the end of the period to which such turnover relates, serve on the dealer liable to pay tax in respect of such turnover, a notice containing all or any of the requisitions which may be included in a notice in the prescribed manner and assess not later than three years from the date of service of the notice the amount of tax due from such dealer to the best of his judgement:

Provided that the amount of tax shall be assessed at the rates at which it would have been liable to tax had there been no escapement of assessment but after making deductions (if any) permitted from time to time by or under this Act:

Provided further that where in respect of such assessment, proceedings are pending in appeal or revision, the appropriate appellate or revisional authority under this Act may, on its own motion or on the report of the Commissioner after giving the dealer concerned a reasonable opportunity of being heard, pass such order as it

deems fit:

Provided further that the provisions of all provisos to sub-section (1) of Section 42 shall mutatis mutandis apply to assessment proceedings under this Section."

8. The provisions dealing with cases where a draft order is required to be prepared, objections are to be invited against such draft order and if received, they are to be transmitted to the higher authority contained under Section 46A as operative at the relevant time, read as under:-

"46A. (1) Where any Sales-Tax Authority mentioned in Section 27 exercising the powers under Section 41 proposes to make an order of assessment under that section and, such order if made would in the opinion of such authority, impose on a dealer a liability to pay an amount not less than Rs. 25,000 by way of tax in respect of a period in addition to the amount of tax indicated by the dealer in his declaration or return in respect of that period, such authority shall serve in such manner as may be prescribed on such a dealer a draft order and invite his objections in relation to it.

(2) Where any Sales Tax Authority mentioned in section 27 exercising the powers under Section 44, 45 or 46 proposes to make an order of re-assessment under Section 44 or an order imposing a penalty under Section 45 or 46 and such order if made, would in the opinion of such authority, impose on a dealer a liability to pay an amount not less than Rs. 25,000 by way of tax or an amount not less than Rs. 7500 by way of penalty in respect of a period in addition to the amount of tax assessed or penalty imposed in respect of that period, such authority shall serve in such manner as may be prescribed on such dealer a draft order and invite his objections in relation to it.

(3) Where the dealer to whom the draft order is served under sub-section (1) or (2) communicates in writing to the authority his objections in relation to the draft order within a period of thirty days from the date of service of the draft order, the authority shall transfer

the proceedings to such other Sales Tax Authority to which an appeal against the order would have lied under Section 65, and there upon the other authority to which the proceedings have been transferred shall exercise the powers under Section 41, 44, 45 or, as the case may be, 46 in relation to those proceedings:

Provided that nothing in Section 82 shall apply to any transfer of proceedings made under this sub-section.

- (4) Where the dealer to whom the draft order is served under sub-section (1) or (2) fails to communicate in writing to the authority his objections in relation to the draft order within a period of thirty days from the date of service of the draft order, the authority shall make an order of assessment or, as the case may be, an order imposing penalty under Section 41, 44, 45 or as the case may be, 46 in accordance with the draft order."

9. It will be noted from the aforesaid provisions that the time limit prescribed for completion of an assessment was, at the relevant time, three years from the end of the year in which the last monthly, quarterly or as the case may be annual return is filed. In view of this provision, the learned Counsel for the petitioner fairly submitted that the contention that the assessments in respect of S.Y 2033 and 2034 were time barred was made on the footing that the period of limitation was two years, but that was a wrong assumption, since in reality as per the provision existing then, it was three years to be calculated from the end of the year in which the annual return was filed. Accordingly, for the S.Y 2033 since the last return was filed in S.Y 2034, the end of S.Y 2034 would be the date from which period of three years was required to be computed, which would end on the last day of S.Y 2037. In the same way, the period in respect of S.Y 2034 for making an assessment order would commence from the end of S.Y 2035 and the assessment order was required to be made within three years thereafter i.e. before the end of S.Y 2038. The proceedings in respect of S.Y 2033 were stayed by order dated 21.10.1981 while for the S.Y 2034 they were stayed by order dated 8.11.1982 and these stay orders were continued from time to time, admittedly until assessment orders were made. Therefore, so far as these two years, namely - S.Ys. 2033 and 2034, are concerned, in computing the period of limitation for the purposes of

Section 42(1), the period during which the assessment proceedings were so stayed under the first proviso, was required to be excluded as provided by the second proviso, and therefore, the assessment orders in respect of these two years were not time barred.

10. As regards the periods covered by S.Y 2029, 2030 and 2032, admittedly the notices for re-assessment were served on the petitioner on 10th October, 1978. As provided by Section 44(b) of the Act, the reassessment was required to be done not later than three years from the date of service of the notice containing the requisitions. The notice prescribed under Section 44 of the Act read with Rule 36 of the Rules framed thereunder was to be in the prescribed form No.37, which required the assessee to attend the office to show cause as to why the amount of tax payable by the assessee in respect of the turn over chargeable to tax in respect of the period in question should not be assessed as per the reasonable belief of the concerned authority. The period of three years contemplated by Section 44(b) which commenced from 10.10.1978 being the date of service of the notice for reassessment on the petitioner ended on 9.10.1981. Admittedly before that day, no stay order was made by the competent authority in respect of the reassessment proceedings. As per the facts placed on record which are not disputed, these reassessment proceedings came to be stayed for the Samvat Years 2029, 2030 and 2032 on 21.10.1981, 8.11.1982 and 19.10.1984 respectively. In the meantime, the period of three years had already expired.

In order to avail of the benefit of exclusion under the Second proviso to Section 42(1), the assessment proceedings are required to be stayed before the expiry of the period of limitation. Any order made after the period of expiry of limitation staying the assessment proceedings cannot relate back to revitalise the proceedings. At the expiry of the period of three years from the dates stipulated in Section 42(1)(a), the authority to make an assessment order ends. All the provisos of Section 42(1) are made applicable mutatis-mutandis to the reassessment proceedings under Section 44 of the Act as provided therein. It would therefore, follow that even in cases where the reassessment order is not made within three years from the date of service of the notice being the time limit prescribed by Section 44(b) no order can be made thereafter unless the proceedings are stayed while they are alive and during the period when an order could have been made by the concerned authority. We are therefore

of the view that no assessment order under Section 44 in respect of the years for which re-assessment was initiated by serving notices on 10.10.1978 on the petitioner could have been made after 9.10.1981 and the subsequent stay of the proceedings was of no avail for extending the period of limitation in respect of these three years beyond 9.10.1981. The impugned orders of re-assessment made in respect of Samwat Years 2029, 2030 and 2032 being beyond the period of limitation, are therefore, without jurisdiction and void.

11. The contention of the learned Government Pleader that for the purposes of an order to be made by the higher authority to which a draft order alongwith the objections is transmitted under Section 46A, the limitation should be computed from the date of service of the draft order finds no support from any statutory provision. On the contrary, the provisions of Section 46A(2) which deal with re-assessment proceedings contemplated that it is the Sales Tax Authority exercising powers under Sections 44, 45 or 46, that proposes to make an order of reassessment which in its opinion imposes a liability of an amount higher than the specified amount and prepares and serves a draft order on the dealer inviting his objections. Now, this stage comes clearly after the initiation of the proceedings for re-assessment under Section 44, which is done by serving a requisite notice on the dealer. The stage of preparation of a draft order in re-assessment proceedings is a stage subsequent to service of such notice. The date of service of notice fixes the starting point of limitation for making the reassessment order, which can be made, in cases where the liability exceeds the amounts stipulated in sub-section (2) of Section 46A even by the authority making the draft order, if no objections are received against the draft order, as contemplated by sub-section (4) of Section 46A. In cases where objections are received, the stipulated higher authority would make such orders after the proceedings are transmitted to it under sub-section (3) of Section 46A. There is therefore, no scope for varying the starting point of limitation which commences in all cases of re-assessment from the date of the service of notice on the dealer as provided by Section 44(b) of the Act and the contention that the period should be computed from the date of service of the draft order is not warranted by any of these provisions. The reassessment orders in respect of the Samwat Years 2029, 2030 and 2032 are therefore, clearly barred by limitation and therefore, could not have been legally passed.

12. The second contention of the learned Counsel for the petitioner is raised in respect of all the five Samvat Years. It is a settled legal position that the power of the State Government or the Commissioner under Section 42(1) of the said Act to stay the assessment proceedings can be exercised only in extraordinary circumstances and for supervening reasons which cannot be attributed to the default or failure of the assessing authorities. The Supreme Court in Fag Precision Bearings (supra), while dealing with a stay order passed under the first proviso to sub-section (1) of Section 42, read with Rule 37-A observed that the Commissioner must put the reasons and circumstances necessitating stay of assessment proceedings in writing, and, in that case, the reasons and circumstances necessitating stay were that, the assessment was in progress and "since some more time will be taken and the assessment proceedings were not likely to be completed within the prescribed time it is considered proper to stay the assessment..." The Supreme Court held that to accept this reason as a good reason for staying the assessment proceedings would amount to holding that the Commissioner of the State Government, can give a go-by to the statutory provision prescribing the period during which the assessment proceedings shall be completed only because the Sales Tax authorities have not completed the assessment proceedings within the stipulated time. It was held that the reason that some more time was required, cannot be accepted as a good reason. This ratio was followed by this Court in Gujarat Steel Tubes Ltd. Vs. Sales Tax Officer, reported in 110 Sales Tax Cases p.401.

In the present case, it is not disputed that in the stay orders there was no ground set out except that some more time was required for making the assessment orders. A sample stay order dated 21st October, 1981 which is annexed at Annexure "C" made in respect of Samvat Years 2028 and 2029 only recorded that it was considered proper to stay the assessment proceedings upto S.Y 2038 as it was not possible to complete the reassessment. As held by the Hon'ble Supreme Court, such a ground was not a good ground and would not in our view amount to any reason contemplated by Rule 37A. If such a ground is accepted, it would defeat the very purpose of providing the time limit for making the assessment/reassessment orders. It is not in dispute that orders in respect of all other Samvat Years were of identical nature purporting to stay proceedings only because some more time was required for making of the reassessment/assessment orders. The impugned orders of stay therefore, cannot be sustained, and consequently,

the period covered by these orders cannot be excluded under the Second proviso to Section 42(1) of the Act for computing the limitation period either in respect of the assessment orders for Samvat Years 2032 and 2033 or even in respect of the reassessment orders made in respect of Samvat Years 2029, 2030 and 2032.

13. In view of what we have said above all the impugned orders passed by the second respondent staying the assessment and reassessment proceedings and the impugned assessment and reassessment orders made on 30.4.1985 by the first respondent as well as the demand notices issued on 12.9.1985 are hereby quashed and set aside. Rule is made absolute accordingly, with no order as to costs.

*/Mohandas